



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION XV

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OHIO

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Bloomfield Hills, Michigan 48304-XXXX

Re: OCR Docket #15-12-1295

Dear xx xxxxx:

This letter is to notify you of the disposition of the above-referenced complaint that was filed with the U.S. Department of Education’s Office for Civil Rights (OCR) against Dearborn Public Schools (the District). OCR Docket #15-12-1295 is the result of a merger of three complaints, filed on xxxxxxxx xx xxxxxx, xxxxxxxxxxxx xx xxxxxx, and xxxxxxxxxxxx xx xxxxxx, which raised substantially similar allegations. The merged complaint alleged that the District discriminated against students with hearing impairments enrolled in the Total Communication (TC) program at the Nowlin Elementary School (TC students) on the basis of their disabilities. Specifically, the merged complaint alleged the following:

1. the District does not provide appropriate space at Nowlin Elementary School (Nowlin), both in terms of classroom size and storage space, for teaching the TC students;
2. the District assigned the TC students to classrooms at Nowlin that, because of spatial limitations, are not accessible to persons with physical disabilities;
3. the District failed to provide accessible transportation on a field trip for the students who need it;
4. the District assigned the TC students to the only classrooms at Nowlin that do not have restrooms, with the result that classroom aides are forced to escort students to the restroom, thereby reducing the time aides spend assisting the students in the classroom;

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5. the District inappropriately placed two TC classes at Nowlin, each with its own curriculum and its own teacher, into one small classroom, which is disruptive to the learning environment, particularly because the TC students rely largely on visual learning;
6. the District inappropriately placed a group of TC students who are in various grade levels in the same extracurricular classes;
7. the District employed teachers and/or aides who are not certified to teach the TC students;
8. Nowlin is not accessible to persons with disabilities in that it does not have accessible routes into the building, accessible parking, or accessible toilet stalls;
9. Nowlin is not equipped with adequate equipment, including alarms, phones, signage, FM systems, and changing tables;
10. the District treats the TC students differently than it does other students at Nowlin by excluding them from the daily morning recitation of the Pledge of Allegiance in the front of the school building with the other students and by not including them in school-sponsored events such as bake sales;
11. the District does not assess the individual needs of each student, or of each prospective student, when determining student placement in the TC program or when determining which classroom to assign a student but, rather, makes placement decisions based on teacher-to-student ratios in the classes;
12. the District retaliated against the TC students and their parents/guardians through its actions in allegations 1, 4, 5, 6, 7, 10, and 11, as well as by forcing a move of the TC program from the District's Whitmore-Bolles Elementary School (Whitmore-Bolles) to Nowlin and by failing to adequately and effectively communicate essential information prior to the beginning of the 2012-2013 school year to parents/guardians of the TC students, such as information regarding bus schedules, teacher assignments, and drop-off locations. These District actions are alleged to constitute retaliation for complaints parents/guardians made to the Michigan Department of Education (MDE); and
13. the District discriminated against one of the students (Student A) by failing to provide adequate supervision in the classroom, resulting in xxxxxxxx xx Student A, and failing to provide xxx with necessary aids and services for her to receive a free appropriate public education (FAPE), including the provision of xxxxxxxx xxxxxx in the classroom at the beginning of the xxxx-xxxx school year, the provision of a xxx xx xxx xxxxx and necessary data collection to determine xxxx need for a permanent xxx xx xxx xxxxx and the provision of an xx xxxxxx xxxxx in all of Student A's educational environments.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, and Title II of the Americans with Disabilities Act of 1990, 42, U.S.C. 12131 *et seq.*, and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by recipients of Federal financial assistance from the Department and by public entities, respectively. Section 504 and Title II also prohibit retaliation against individuals who seek to pursue rights protected by these statutes. As a recipient of Federal financial assistance from the Department and as a public entity, the District is subject to these laws. Therefore, OCR had jurisdiction over this complaint.

Based on the complaint allegations, OCR investigated the following legal issues:

- whether programs at the District are readily accessible to and usable by persons with disabilities as required by the Section 504 implementing regulation at 34 C.F.R. § 104.21 and the Title II implementing regulation at 28 C.F.R. § 35.149;
- whether the District treats qualified students with disabilities in its TC program differently from students without disabilities, denies them the opportunity to participate in or benefit from its aid, benefit, or service, or otherwise limits them in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service, in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.4 and the Title II implementing regulation at 28 C.F.R. § 35.130;
- whether the District fails to take appropriate steps to ensure that communications with students with disabilities are as effective as communications with others, in violation of Title II's implementing regulation at 28 C.F.R. § 35.160(a);
- whether the District fails to furnish appropriate auxiliary aids where necessary to afford individuals with disabilities an equal opportunity to participate in, and enjoy the benefits of, its service, program, or activity, in violation of the Title II implementing regulation at 28 C.F.R. § 35.160(b);
- whether the District fails to provide nonacademic and extracurricular services and activities in such a manner as is necessary to afford students with disabilities an equal opportunity for participation in such services and activities, in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.37;
- whether the District is denying qualified students with disabilities a free and appropriate public education (FAPE) by failing to provide them with aids, benefits, and services that are designed to meet their individual educational needs as adequately as the needs of students without disabilities are met in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.33;

- whether the District has failed to establish standards and policies and procedures for the evaluation and placement of students with disabilities that comply with the regulation implementing Section 504 at 34 C.F.R. § 104.35; and
- whether the District intimidated, threatened, coerced, or discriminated against an individual for the purpose of interfering with any right or privilege secured by Section 504 or Title II or because that individual made a complaint under Section 504 or Title II, in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.61 and/or the Title II implementing regulation at 28 C.F.R. § 35.134.

To conduct its investigation, OCR interviewed the Complainants, parents of students in the TC program, and employees of the District, including staff and administrators. OCR also made a site visit to the District, including visits to both Nowlin and Whitmore-Bolles, and reviewed documents that the Complainants and the District submitted. OCR has determined that the evidence is sufficient in part and insufficient in part to conclude that the District violated Section 504 and Title II with respect to the complaint allegations. The District submitted a Resolution Agreement to resolve OCR's non-compliance findings. The bases for OCR's decision are discussed below.

Background

The class allegations alleged in this complaint center around events occurring at the end of the xxxx-xxxx school year and during the xxxx-xxxx school year. The complaint allegations concern a Wayne County Regional Educational Service Agency (Wayne County RESA) center-based TC program for deaf and hard-of-hearing students in pre-kindergarten (pre-k) through the fifth grade. According to information the Wayne County RESA provides on its website and in program materials, the TC program uses signed English as the primary language of instruction in the classroom and emphasizes American Sign Language (ASL), finger spelling, language and speech development, speech reading, and the use of individual/group amplification and the systemic development of residual hearing. TC programs in general support the use of all modes of communication and language as needed in differing contexts.

During the time period at issue, the TC program at the District received students from school districts throughout Wayne County except the Detroit Public Schools, which has its own TC program. According to the Complainants, for more than 30 years prior to the xxxx-xxxx school year, the TC program was at Whitmore-Bolles. At the end of the xxxx-xxxx school year the District moved the program to its present location at Nowlin. Many parents of the students in the program and the teachers opposed the move. During the pendency of its investigation, OCR received information indicating that the District planned to discontinue the TC program at Nowlin at the end of the xxxx-xxxx school year.

The TC program that was at Nowlin during OCR's investigation of this complaint was

comprised of three classes, including a pre-k and kindergarten class (pre-k-k), a class of students in the first through third grades, and a class of students in the third through fifth grades.

Alleged Inaccessibility (Allegations ##2 and 8)

The Complainants alleged that Nowlin is inaccessible in numerous respects, including the parking and routes into the building, toilet stalls, and the TC classrooms, which, the Complainants stated, have limited maneuverability.

- **Applicable Regulatory Standards**

The Section 504 and Title II regulations state that no qualified person with a disability shall, because a covered entity's facilities are inaccessible to or unusable by persons with disabilities, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any of the entity's programs or activities.

34 C.F.R. § 104.21; 28 C.F.R. § 35.149. The regulations reference standards for determining whether an entity's programs, activities, and services are accessible to individuals with disabilities, depending upon whether the facilities are determined to be existing, new construction, or alterations. The applicable standard depends upon the date of construction or alteration of the facility.

For existing facilities, the regulations require an educational institution to operate each service, program, or activity so that, when viewed in its entirety, it is readily accessible to and usable by individuals with disabilities. This standard does not necessarily require that the institution make each of its existing facilities or every part of a facility accessible if alternative methods are effective in providing overall access to the service, program, or activity. 34 C.F.R. §104.22(a); 28 C.F.R. § 35.150(a). Under the Section 504 regulation, existing facilities are those for which construction began before June 3, 1977. Under Title II, existing facilities are those for which construction began on or before January 26, 1992.

To provide program access in existing facilities, an institution may use such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at alternative accessible sites, alteration of existing facilities, construction of new facilities, or any other methods that result in making its program or activity accessible to persons with disabilities. A recipient is not required to make structural changes in existing facilities where other methods are effective in providing program access.

Carrying an individual with a disability is an ineffective and unacceptable method for achieving program accessibility. Carrying is contrary to the goal of providing accessible programs, which is to foster independence. Carrying is permitted only in manifestly

exceptional cases (e.g., programs conducted in unique facilities, such as an oceanographic vessel), and carrying is not permitted as an alternative to structural modifications such as installation of a ramp or a chairlift.

In choosing among available methods for providing program access, the institution is required to give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate. 34 C.F.R. § 104.22(b); 28 C.F.R. § 35.150(b).

The Section 504 regulation also requires a recipient to adopt and implement procedures to ensure that interested persons can obtain information as to the existence and location of services, activities, and facilities in existing construction that are accessible to and usable by persons with disabilities. 34 C.F.R. § 104.22(f).

The Title II regulation, at 28 C.F.R. § 35.150(a)(2) and (3), provides that, with respect to existing facilities, a public entity is not required to take any action that would threaten or destroy the historic significance of an historic property nor action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administration burdens. In such cases, however, the public entity must take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.

For new construction, the facility or newly constructed part of the facility must itself be readily accessible to and usable by persons with disabilities. 34 C.F.R. § 104.23(a); 28 C.F.R. § 35.151(a). With regard to alterations, each facility or part of a facility that is altered by, on behalf of, or for the use of an institution after the effective dates of the Section 504 and/or Title II regulation in a manner that affects or could affect the usability of the facility or part of the facility must, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by persons with disabilities. 34 C.F.R. § 104.23(b); 28 C.F.R. § 35.151(b).

For an entity covered by Section 504, new construction and alterations after June 3, 1977, but prior to January 18, 1991, must conform to the American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped (ANSI). New construction and alterations between January 18, 1991, and January 26, 1992, must conform to the Uniform Federal Accessibility Standards (UFAS). Compare 45 C.F.R. § 84.23(c) (1977) and 34 C.F.R. § 104.23(c) (1981), with 34 C.F.R. § 104.23(c) (2012). New construction and alterations after January 26, 1992, but prior to March 15, 2012, must conform to UFAS or the 1991 Americans with Disabilities Act Standards for Accessible Design (the 1991 ADA Standards) or equivalent standards. However, the regulation provides, at 34 C.F.R. § 104.23(c), that departures from particular technical and scoping requirements of UFAS by the use of other methods are permitted where substantially equivalent or greater access to and usability of the building is provided.

The U.S. Department of Justice published revised regulations for Titles II and III of the ADA on September 15, 2010. These regulations adopted revised, enforceable accessibility standards called the 2010 ADA Standards for Accessible Design (the 2010 ADA Standards). The 2010 ADA Standards went into effect on March 15, 2012, although entities had the option of using them for construction or alterations commencing September 15, 2010, until their effective date. For new construction and alterations as of March 15, 2012, public entities must comply with the 2010 ADA Standards.

With regard to parking, the U.S. Department of Justice has stated that, when an ADA-covered entity restripes a parking lot, it must provide accessible parking spaces as required by the ADA Standards, and that failure to do so would violate the ADA.¹

In reviewing program access for an existing facility, the ADA Standards or UFAS may also be used as a guide to understanding whether individuals with disabilities can participate in the program, activity, or service.

- **Investigation Summary and Analysis**

The District stated that Nowlin was constructed in 1945 and the District added a new wing to the building (the north wing) in the 1950s (the District could not provide OCR with an exact date). The District represented that it remodeled parts of the building, including the accessible restrooms in the south wing of the building (which District staff members referred to as the “special education wing of the building”) in 1994-1995. There are several special education classes at Nowlin in addition to the TC program classes, all but one of which are located in the south wing of the building. The school is on one level with no internal stairs.

Described below are the parking areas connected to Nowlin, the routes into the building, the toilet stalls in the accessible restrooms, and the TC classrooms, based on information gathered during OCR’s onsite visit to the building on May 14 and 15, 2013.

- **Parking Facility**

The (only) parking facility at Nowlin has approximately 40 spaces that are repainted every summer. Therefore, the 2010 ADA Standards are applicable. During OCR’s onsite visit cars were parked in unmarked areas that could also be considered spaces, but even including these areas as spaces there are fewer than 50 total parking spaces. Thus, a minimum of two spaces in this parking facility must be accessible, pursuant to the 2010 ADA Standards at Section 208.2. Three of the spaces are designated as accessible, and all three spaces abut an access aisle. Two of the three spaces are located near the south entrance of the building. The third designated accessible space is near the north entrance to the building.

The two spaces near the south entrance share an access aisle and are on the shortest route to the south entrance of the building. Each space is over 100 inches wide, and the access

¹ <http://www.ada.gov/restripe.htm>

aisle between the two spaces is more than 96 inches wide. Therefore, these spaces meet the width requirements of the 2010 ADA Standards at Section 502.2. Both of these two spaces are designated as accessible with a standing sign with the international symbol of accessibility and both spaces have the international symbol of accessibility painted in the space. However, one of the two signs is affixed to a fence and not at a sufficient height to be fully visible. Neither space is specifically identified as van-accessible. Thus, the signage for these spaces does not comply with the 2010 ADA Standards at Section 502.6. The access aisle is properly demarcated by painted diagonal stripes. Although the ground surface of both of the spaces and the access aisle is relatively level, all three spaces have areas where the slope has a ratio of rise to run that is greater than permissible by the 2010 ADA Standards at 502.4 (greater than 1:48) as well as the permissible slope for walking routes at Section 402 (greater than 1:20). Additionally, the access aisle and an area in the west parking spot have a cross slope that exceeds both standards in spots, particularly near the mid-section of the access aisle. Therefore, the spaces are not compliant with Sections 402 or 502.4 of the 2010 ADA Standards. The parking facility has a concrete surface that is relatively stable, firm, and slip resistant in most areas except where a substantial horizontal crack runs across both parking spaces and the access aisle.

The third space is across from the other two, and is on the shortest route to the north entrance of the building, near the gymnasium. This space is on a curvature, but at its narrowest point it is 127 inches wide and abuts an access aisle that is 100 inches wide. No standing sign indicates that it is accessible although the international symbol of accessibility is painted on the ground. This is not sufficient to satisfy the requirements at Section 502.6 of the 2010 ADA Standards. The ground surface is nearly level in all directions and there are no slopes that exceed the rise/run ratio limits in the 2010 ADA Standards.

- **Routes and Entrances**

The route from the two designated accessible spaces in the south end of the parking area leading to the ramp into the south entrance is relatively flat and stable, and has a slip-resistant surface with no appreciable sloping. The District constructed a ramp by the door of this entrance in the fall of the 2012-2013 school year and therefore the 2010 ADA Standards applied to this renovation. The ramp at the entrance leading into the door, which is similar in appearance to a curb cut, is not accessible because of steep slopes. It is comprised of six concrete squares that range in distance between 83 inches and 101 inches. The slope of each of these squares has an incline ratio, in areas, as high as 1:8, exceeding even the slope standards for ramps, and in all areas far exceeding the permissible slope incline ratio of 1:20 set forth in the 2010 ADA Standards at Section 403.3 for areas that are not ramps. Because it is not designed as a ramp, it also does not otherwise meet the other 2010 ADA Standards for ramps. For example, there is no handrail.

Because it was constructed in 1945, the program accessibility standard applies to the entrance itself. Using the ADA Standards for guidance, OCR noted that the interior set of doors are 30 ½ inches in width and require 12 pounds of force to open. Although the

1992 and 2010 ADA Standards require doors to be 32 inches wide, OCR did not obtain any evidence in this investigation indicating that any individuals were unable to access any program located in the building due to the width of this entrance, and learned that at least one student who used a wheelchair was able to pass through the doorway. The pounds of force to open the doors, however, must be reduced, and the District may have to make modifications to the doorway width or be ready to move programs to accessible locations in the future if necessary to provide program access.

The route from the parking space on the north side of the parking lot leading into the north (or gymnasium) entrance is a flat, slip-resistant surface with a flat threshold. The exterior doors are 30 inches wide, which, as noted above, do not meet the width requirements of either the 1992 or the 2010 ADA Standards, although OCR did not obtain evidence in the investigation that the width of this route was keeping any individual from accessing District programs at the facility. The doors require 14 pounds of force to open. The doors open to a wide hallway with close-pile carpet. The threshold is not quite a half-inch and is beveled.

Overall, the parking area and route to the north entrance are more accessible than the parking and route to the south entrance of the building, which is the entrance nearest to two of the three TC classrooms, as well as all of the other special education classrooms in the building. For students in the TC program who have mobility impairments, or who are very young, the distance from the north entrance to their classrooms may be significant.

- **Toilet Stalls**

The classrooms in the north wing of the building, including classroom #22 for the third-through-fifth-grade TC class, have boys' and girls' restrooms attached to them but these restrooms are not accessible. With one exception (the general education kindergarten classroom), the classrooms in the south wing of the building, including the pre-k-k TC classroom, do not have attached restrooms. The pre-k-k TC students use the boys' and girls' restrooms across the hall and immediately adjacent to their classroom. The District made substantial renovations to both of these restrooms in either 1994 or 1995 and therefore OCR applied the 1992 ADA Standards to the renovated areas of these restrooms.

With respect to the girls' restroom (room 111), a short foyer off of the main hallway leads to the entrance of the restroom. It is 80 ½ inches wide and provides ample maneuverability. There is room on both the hinge side and the latch side of the door to meet the 1992 ADA Standards, and the door meets the 1992 ADA Standards in every respect except that it requires twelve pounds of force to open, seven pounds in excess of the acceptable maximum, pursuant to the 1992 ADA Standards at Section 4.13.11.

One of three toilet stalls in the girls' restroom is designed for accessibility. Although the designated accessible toilet stall has 69 inches of floor space, sufficient to meet the maneuverability requirements of the 1992 ADA Standards at Section 4.17.3 and Figure 30, a large changing table in the stall impeded the clear floor space at the time of OCR's

visit. This may be addressed by moving the table. Additionally, the grab bar behind the toilet is 35 ½ inches, which is one half-inch shorter than the 36 inches the 1992 ADA Standards require at 4.17.3 and Figure 30(a). The two sinks in the restroom have exposed pipes and surfaces, in violation of the 1992 ADA Standards at 4.19.4. The mirror above the lowest sink is mounted slightly higher than the maximum permissible height of 40 inches from the floor pursuant to 1992 ADA Standards at 4.19.6 and Figure 31. Finally, the bottom of the soap dispenser is 39 inches from the floor, which is within permissible reach ranges under the 1992 ADA Standards, but may be too high for young children using wheelchairs.

The boys' restroom in the south wing (room 103), has an entrance at the end of a hallway that is 113 inches long and 39 ¾ inches wide, which, although narrow, complies with the route requirements of the 1992 ADA Standards at 4.3.4. However, the door is 37 ¼ inches wide, and there is no maneuverability on either the hinge side or the handle side of the door. The entrance to this restroom, therefore, does not meet the maneuvering clearance requirements for either the front approach or the hinge approach as set forth in the 1992 ADA Standards at 4.13.5 and Figure 25. Otherwise, the restroom is large and meets all other maneuverability standards. The restroom has two urinals, two sinks, and one designated accessible toilet stall.

The designated accessible toilet stall fails to meet the 1992 ADA Standards in several respects. The toilet is set 22 inches from the nearest wall to its center, four inches greater than the maximum permissible distance from the wall, pursuant to the 1992 ADA Standards at 4.17.3 and Figure 30(a). Additionally, the door to the accessible stall is bent and the lock on the door is broken so that the stall door does not lock. Finally, a changing table placed in the stall reduces the maneuverability space and, as with the girls' restroom, will have to be either relocated or replaced.

One of the two sinks in this restroom meets all of the accessibility requirements of the 1992 ADA Standards except that the pipes under the sink are exposed and the bottom of the sink basin is 26 inches, one inch below the minimum height requirements under the 1992 ADA Standards at 4.19.2 and Figure 31. The flush control on the urinal is mounted 45 inches above the floor, one inch higher than the maximum permissible 44 inches pursuant to the 1992 ADA Standards at 4.18.4.

○ **Maneuverability Within the TC Classrooms**

One of the Complainants alleged that she saw a wheelchair outside of the pre-k-k classroom and stated that the classroom did not have sufficient space for wheelchair maneuverability. She believed the teacher carried a student into this classroom. Because the classrooms were constructed in 1945 with the original school building, OCR applied the program access standard in analyzing the maneuverability and accessibility of the classrooms.

All of the special education classrooms in the south wing of the building, including the TC classrooms, are 660 square feet. The general education kindergarten classroom in the

south wing of the building is 848 square feet. The classroom size of 660 square feet is sufficient to meet the minimum spatial requirements to provide program access. It is also clear upon viewing the two classrooms, both of which serve a similar number of students (no greater than seven), that there is sufficient space for the maneuverability of either a wheelchair or a walker, depending on how much furniture is in the classroom and how it is arranged.

With respect to the wheelchair outside of the classroom, according to the preschool teacher, a pre-k student in her class during the 2012-2013 school year had a mobility impairment and used a wheelchair on occasion. She did not, however, use her wheelchair in the classroom, upon the advice of her physical therapist, who recommended that the student use and develop her leg muscles by using a walker and/or classroom furniture to crawl and lift herself. The student's wheelchair was left outside the classroom for this reason, not because of the spatial limitations of the room.

The teacher told OCR, however, that even a walker is too wide for some areas of the classroom and that it was therefore more convenient for the student to either crawl or stand and walk from one center to another using furniture as a brace; OCR staff observed this student in the classroom using furniture as a brace while she walked. The teacher stated that she could not configure the furniture in her room in a fashion that would provide the space needed for the student's walker because she required specific centers within her classroom and the floor space was not sufficient for that arrangement. The paraprofessional, however, stated that there was sufficient space in the classroom for the students, including the student with the walker, to maneuver, and OCR staff observed that the classroom could be arranged to create more space.

In sum, although two of the TC classrooms are smaller than the general education classrooms, the evidence obtained by OCR in this investigation was not sufficient to conclude that the District was in violation of the program accessibility requirements in the Section 504 and Title II regulations. However, the District should be mindful of the need to design and arrange furniture within rooms to allow maneuverability and access to its programs by persons with disabilities.

However, classroom #22 for third-through-fifth-grade TC students, which is located in the north wing of Nowlin, has a doorknob on the door that requires twisting and turning and is therefore not useable by persons with disabilities.

Allegations Regarding Auxiliary Aids, Effective Communication, and Different Treatment (Allegations ## 1, 3, 4, 5, 6, 9, and 10)

The Complainants generally alleged that the District treated the students in the TC program in an unwelcome manner when the program moved from Whitmore-Bolles to Nowlin, citing alleged instances where the TC students were treated differently than the students in general education classes at Nowlin. The Complainants also alleged that the District failed to provide necessary or effective auxiliary aids or effective communication in some instances. The Complainants specifically alleged that: 1) the TC classrooms were smaller than the general education classrooms, had less storage space, and did not

have attached restrooms; 2) the District combined two TC classes into one small classroom; 3) Nowlin had incomplete emergency warning and removal procedures that did not address all emergency scenarios for the TC students; 4) the District did not provide appropriate auxiliary aids to the TC students at Nowlin at the beginning of the xxxx-xxxx school year, including appropriate changing tables, signage, telephones, and FM systems; 5) the District either excluded the TC students from or provided them different access to both extracurricular and nonacademic school-wide activities, such as the school flag-raising ceremony each morning and an afternoon bake sale; and 6) in one instance the District did not provide the necessary transportation for a student to participate in a field trip.

- **Applicable Regulatory Requirements**

The Section 504 implementing regulation at 34 C.F.R. § 104.4(a) provides that no qualified person with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from federal financial assistance. Title II's implementing regulation contains a similar provision for public entities at 28 C.F.R. § 35.130(a). Prohibited discrimination by a recipient or public entity includes denying a qualified person with a disability the opportunity to participate in or benefit from the aids, benefits, or services offered by that recipient or public entity; affording a qualified person with a disability an opportunity to participate in or benefit from aids, benefits, or services that is not equal to that afforded others; providing a qualified person with a disability with aids, benefits, or services that are not as effective as those provided to others; providing different or separate aids, benefits, or services to a person with a disability than those provided to others, unless necessary; or otherwise limiting a qualified person with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others. 34 C.F.R. § 104.4(b)(1)(i)-(iv) and (vii); 28 C.F.R. § 35.130(b)(1)(i)-(iv). For aids, benefits, and services to be equally effective, they must afford persons with disabilities an equal opportunity to obtain the same result or to gain the same benefit, in the most integrated setting appropriate to the person's needs. 34 C.F.R. § 104.4(b)(2); 28 C.F.R. § 35.130(d).

Under Section 504 and Title II, a school district must ensure that students with disabilities have an equal opportunity to benefit from services provided to others, such as emergency evacuation procedures, and cannot provide different services unless necessary to provide students with disabilities with services that are as effective as those provided to others. The Title II regulation further states that public school districts must also make reasonable modifications in policies, practices or procedures when such modifications are necessary to avoid discrimination on the basis of disability, unless they can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity. 28 C.F.R. § 35.130(b)(7).

Title II also requires, at 28 C.F.R. § 35.160(a), that public entities take appropriate steps to ensure that communications with persons with disabilities are as effective as communications with others. The Title II regulation, at 28 C.F.R. § 35.160(b), requires

that a public entity furnish appropriate auxiliary aids and services where necessary to afford qualified individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity. The Title II regulation states that the type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place.

In determining what types of auxiliary aids and services are necessary, a public entity is required to give primary consideration to the requests of individuals with disabilities. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.

When interpreting what constitutes “primary consideration,” guidance provided by the U.S. Department of Justice in Appendix A to the Title II regulation states:

As noted in the preamble to the 1991 Title II regulation, and reaffirmed here: ‘The public entity shall honor the choice [of the individual with a disability] unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under § 35.164. Deference to the request of the individual with a disability is desirable because of the range of disabilities, the variety of auxiliary aids and services, and different circumstances requiring effective communication.’

28 C.F.R. Part 35, App. A (2010).

The Section 504 regulation, at 34 C.F.R. § 104.37(a), states that a recipient institution shall provide nonacademic and extracurricular services and activities, including but not limited to, transportation and recess, in such a manner as is necessary to afford students with disabilities an equal opportunity for participation in such services and activities. Section 504 and Title II also require that, in providing or arranging for the provision of nonacademic and extracurricular services, recipient institutions shall ensure that a person with a disability participates with non-disabled persons in such activities and services to the maximum extent appropriate to the needs of the person with a disability.

34 C.F.R. § 104.34(b).

In investigating an allegation of disability discrimination under a different treatment theory, OCR first will determine whether the recipient treated individuals with a disability differently from individuals without a disability in similar circumstances. If so, OCR will determine whether the recipient has articulated a legitimate, nondiscriminatory reason for the difference in treatment and then whether that reason was a pretext for unlawful discrimination. Generally, under Section 504, an elementary or secondary

school student with a disability is a qualified individual with a disability if the student is of an appropriate age to participate based on state law or Federal disability laws.

Investigation Summary and Analysis

○ Classroom Comparability

The Complainants alleged that the District placed all of the TC classes in the special education wing of Nowlin where the classrooms have less floor and storage space than the general education classrooms and do not have attached restrooms. In addition, one of the Complainants noted, and OCR staff confirmed, the two south-wing TC classrooms do not have promethean boards (smart boards). The Complainants and the TC program teachers stated that deaf students in particular could benefit from the smart boards because of the visual opportunities that technology offers. In late November xxxx, the third-through-fifth-grade TC class, which had been combined in the same classroom as the first-through-third-grade class, moved into its own classroom in the north wing of the building, which is a larger classroom with an attached restroom and a smart board.

With respect to classroom size, the District provided OCR with the square footage of each classroom in Nowlin, which confirms that the general education classrooms are larger than the TC classrooms by between 250 to 270 square feet. However, the TC classes generally have approximately one-half to one-third the number of students that the general education classrooms have. For example, during the xxxx-xxxx school year there were between five and seven students enrolled in the pre-k-k classroom, and by state law these classes cannot contain more than seven students. In contrast, according to District documents, there are between 17 and 26 students in each of the general education classrooms.

At approximately the same time that the Complainants filed complaints with OCR, two of the Complainants filed complaints regarding class size with MDE, alleging a violation of the Michigan Administrative Rules for Special Education (MARSE), Rule 340.1733(a), which requires each special education classroom to have at least the same average number of square feet per student as provided for general education students in the school district. MDE analyzed the square footage of each general education classroom relative to the number of students and staff in each classroom and determined that one kindergarten, one first grade, one second grade, one third grade, one combined third and fourth grade, and one fifth grade classroom had less square footage per staff/student than the classrooms for the students in the TC classes, including the combined TC class in the beginning of the xxxx-xxxx school year. Moreover, only one kindergarten classroom and three classrooms for students with autism spectrum disorder had more square footage than the TC classrooms. MDE also found that the average square footage for all of the general education classrooms within the building per staff/student was less than the average square footage per person for the combined TC classroom. MDE therefore found no violation of the state law in question.

Additionally, the District's director of special education told OCR staff that he recommended to the TC teachers that an occupational therapist help the teachers with the spatial layout of their classrooms by considering the flow, particularly, of the combined TC classroom. He stated that his observation was that the small group instruction areas were fine, but he thought the teachers had too many things in the classroom as well as a layout issue. He told OCR that, to address both the spatial layout of their classrooms and their storage concerns, they had meetings about where the TC teachers could store some of their materials and supplies in the building and worked out a space at the media center where they could store their books. They also talked about other storage areas in the building that could be locked.

As noted and documented above, the TC classrooms, upon viewing, did not appear to be unduly small for the number of students in each of the TC classes. The District represented that in the past the south-wing classrooms held larger groups of general education classes and they appeared to be designed as classrooms. Moreover, as noted, one of the three TC classes was moved to a larger general education classroom. There is no evidence to indicate that the smaller classrooms for the smaller TC classes would have provided them with less classroom space per student or otherwise give them unequal access to the benefits of the District's program.

With respect to storage space, OCR staff inspected the facilities and the smaller classrooms have shelves, cabinets, and storage space, although apparently less than what is available in the larger classrooms. In addition, as has been noted, the principal said that the school building has group storage space, including an area off of the gymnasium, for use by all the teachers in the building. The principal said that she keeps these storage areas locked. According to the principal, the TC teachers never complained to her about lack of storage. In response, one of the TC teachers stated that she kept holiday decorations and boxes of books at home and did not use the group storage space because no one told her it was available and it would not be that useful to have her materials in a remote location that was locked up anyway. She stated that she needed her materials, such as books, to be readily available.

Again, as with the smaller classrooms, although the TC teachers may have less storage space in their classrooms than the general education teachers, they also have fewer students and the disparity does not appear to be so great so as to limit the TC students' access to the benefits of the District's programs.

Regarding the restrooms, the Complainants stated that classrooms for the TC students did not include attached restrooms such as those attached to all of the general education classrooms, including the one general education classroom in the south wing of the building. The Complainants said that this resulted in lost instruction time because the TC teachers were taking students to the restroom frequently. They said this was a particular problem for the pre-k-k students who needed to use the restroom more frequently and required closer monitoring when doing so. In addition, the Complainants said that some of the pre-k-k students were not potty-trained and having an attached restroom would have afforded those students greater privacy in addressing toileting issues.

The District responded and OCR staff confirmed that the hallway restrooms are directly across the hallway from the pre-k-k classroom and immediately adjacent to the first-through-third-grade TC classroom (the other TC class in the south wing). These restrooms are designated accessible, unlike the attached restrooms in each classroom. The District stated that the close proximity of these restrooms and the assistance of classroom paraprofessionals alleviate any disruptions that restroom breaks could cause. The accessible toilet stalls provide space for a table to change those students who are not yet potty-trained (although as noted above, the District will have to arrange the changing table differently in the restroom to ensure accessible maneuverability in that toilet stall).

The pre-k-k teacher told OCR that she sends the students as a group to the restroom at regular intervals daily. In addition, throughout the day, if a student needs to use the restroom, either she or the paraprofessional will escort them there. The teacher noted that when the paraprofessional has lunch, which lasts between 45 minutes to an hour, the teacher is alone with the students. She said that, typically, there may be one or two instances in the morning and one or two instances in the afternoon when she or the paraprofessional has to escort a student to the restroom. It takes about 30 seconds to check on them, but if a student has a bowel movement it can take ten minutes. However, the teacher acknowledged that she would not stay with a student in the restroom for ten minutes.

The teacher and paraprofessional said that, in addition, during the xxxx-xxxx school year one student in particular had to be xxxxxxxx xxxxxxxx xxxxxxxxxxxx xxxxxxxx at regular intervals xxxxx xxxxxx a day. The paraprofessional said that she did not believe that it was disruptive to that student's education or the educational experience of other students in the class for the paraprofessional to take that student, or others as necessary, to the xxxxxxxx during the school day. The other TC teacher with a classroom in the south wing of Nowlin said her students are independent and can take themselves to the xxxxxxxxxxxx.

With respect to the smart boards, OCR staff confirmed during its onsite that all the general education classrooms, including the general education kindergarten in the south wing of Nowlin where the special education classrooms are located, have smart boards, and that only one of the special education classrooms has a smart board—the TC classroom in the north wing of the building. The principal stated that the District did not have funding to place smart boards in all of the classrooms at one time, so she started at one end of the hall, placed smart boards in two or three classrooms at a time, and would eventually place smart boards in all of the classrooms as funding became available. She stated that in planning for the addition of the smart boards she systematically went room by room down the hall, starting randomly at the north wing of the building, where all but one of the general education classrooms are located. The Complainants confirmed that for the xxxx-xxxx school year the south wing classrooms still did not have smart boards.

With respect to the classroom size, storage space, and restrooms, the evidence is insufficient to show that, to the extent that the TC students are treated differently than individuals in general education classes, this results in inequality in the TC students' access to the benefits of the District's programs. Although the two TC classes are in

smaller classrooms with less storage space, they have fewer students and therefore less need for space. According to findings MDE made, the classrooms themselves have more space per student and staff member than the general education classrooms have. Moreover, the TC program teachers have access to storage space outside of their classrooms. Although the two TC classrooms do not have restrooms attached to them, there are restrooms directly adjacent to the classrooms and the evidence is not sufficient to show that the students are negatively impacted by the restroom arrangement. Moreover, the District has provided a legitimate, nondiscriminatory reason for placing the TC classes in the smaller classrooms (fewer students), and the evidence is insufficient to support a finding that the reason provided is pretextual. OCR also found that the hallway restrooms are accessible whereas the classroom restrooms are not and are near to the TC classrooms. The evidence showed that the assignment of paraprofessionals to the TC classrooms helped alleviate any impact the use of hallway restrooms instead of classroom restrooms might have had on the TC students.

However, the evidence does show that the south wing classrooms, where all but one of the special education classes are located, do not have smart boards, and that the only classroom that does have a smart board is the general education kindergarten classroom. The District did not provide a legitimate, nondiscriminatory reason for this disparity, other than that it was a random decision to start at the north hall of the building and go room by room as money for smart boards became available. This is not a legitimate basis for treating the students with disabilities differently. Thus, the evidence is sufficient to find that in placing smart boards only in the general education classrooms, with no legitimate basis to support that decision, the District has discriminated against the students in the TC classes, as well as other special education classes in the south wing of the building.

- **Combined TC Classes in One Classroom**

The Complainants alleged, and the District acknowledged, that during the first few months of the xxxx-xxxx school year, until late November xxxxx, the District placed two TC classes into one of the small classrooms at Nowlin. The two TC classes included first-through-third-graders (one class grouping) and third-through-fifth-graders (the other class grouping). Although the District cited space limitations as the reason for this arrangement, at the beginning of the xxxx-xxxx school year one classroom became available in the south wing and the District divided a large kindergarten class in two classes and gave the available classroom to a general education kindergarten class instead of giving it to one of the two combined TC classes.

The two TC program classes used different curricula. The Complainants stated that the classroom was too small and there was too much commotion for effective learning to occur, particularly given that the TC students in the classroom were visual learners due to their hearing impairments. The teachers stated that there was no educational benefit to placing these students in a small classroom together.

When the teachers complained to the principal of Nowlin about the combined classroom in the smaller space, the principal offered a number of alternatives to the teachers, such as moving one group of students to a small area in the school off of the stage, or to the library. She alternatively suggested that they use these spaces as necessary for particular lessons or when giving tests. The teachers said the alternatives were not adequate because of the disruption of constantly moving to a different location and the difficulty of moving their instructional materials back and forth, particularly given the number and size of the instructional materials they use with their students because of their reliance on visual cues. As has been noted, the District separated these TC classes at the end of November xxxx.

The teachers both stated that, as a result of sharing the classroom, there were more interruptions and distractions during the school day. One teacher stated that she was behind in her lessons at the end of the school year, but that there were many variables that contributed to that. They also emphasized that co-teaching was not an effective pedagogical approach for deaf students, who rely more on visual learning than students in a typical classroom. With less physical space and more visual chaos, the environment for learning, they said, was diminished.

The District noted the additional space that the students in the combined TC classroom had per student relative to the students in most of the general education classrooms (there were ten students total in the combined TC classroom). In addition, District administrators said that the District has several “split classes” with two grades placed together in one classroom. For example, during the xxxx-xxxx school year Nowlin had a combined general education classroom of first- and second-grade students and in the xxxx-xxxx school year it combined a general education classroom of third- and fourth-grade students.

The District’s director of special education said that with only ten students total in the two-teacher classroom he felt that it presented an opportunity for students to do small group work together, using cooperative, or parallel, teaching, with students on either side of the room “rotating” from among small groups. He said he also thought that groups of students could work independently. Additionally, the director said that the District offered to give the TC teachers professional development on two-teacher classrooms but the teachers declined the offer. The director said he did not observe either teacher in the combined classroom experiencing problems during his classroom observations, which he said he made frequently, particularly at the beginning of the school year.

According to the director, District administrators thought it would have a positive impact on the students and the teachers, based on research showing that co-teaching and collaboration is effective in both general education and special education classrooms. He said that in other instances where the District combined classes into one classroom, such as the moderately cognitively impaired program at the middle school, where they have combined three grade levels with two teachers, they have been successful.

The principal stated that she was aware that the parents and teachers of the TC classes were not satisfied with the split classroom, but she concurred with the director of special education, stating that she thought it was a great concept. She acknowledged, however, that the District is selective about the students they place in combined classrooms generally and consider the students' level of independence.

According to the principal, in November xxxxx, although she thought it was unnecessary, one of the combined TC classes moved to its own classroom, in response to the concerns the parents and the TC program teachers raised, which was what the principal thought was disruptive.

In summary, with respect to the combined classes, the evidence shows that students in two TC program classes were in a combined classroom for two months at the beginning of the xxxx-xxxx school year. However, the District represented that it had successfully combined both general education and special education classes, including during the xxxx-xxxx school year, and including at Nowlin, and therefore that it did not treat the students in the TC classes differently than students with no disabilities in combining the two classes.

The evidence shows that the District gave the TC students alternatives to the combined classroom, and ultimately did separate the classes out. The only evidence supporting that the students in the combined TC classroom were negatively impacted was one teacher's statement that she was behind in her lessons at the end of the year. However, she indicated that this was due to a variety of factors, and the principal indicated that the contention and complaints about the combined classroom were more disruptive than the actual combined classroom. OCR obtained information that demonstrates that the District had successfully combined both general education and special education classes, including during the year and at the school at issue in this complaint. Therefore, the evidence does not support that combining the two classes in one classroom had an adverse effect on the TC students. OCR also determined that the evidence does not support that the TC students were treated differently than students who did not have disabilities, or who had different disabilities.

- **Emergency Alarms**

The Complainants alleged that there are no fire alarm systems for the deaf and hard of hearing students and staff at Nowlin in the sensory room, in the staff restroom, on one side of the library, in the book room, and in the audiologist's office.

When the District moved the TC program to Nowlin, the school building was not equipped with visible alarms. OCR learned that although the District knew the TC program was moving in early summer xxxx, and parents and teachers raised concerns at that time about Nowlin having inadequate visual alarms, the District did not install visual alarms in the building until February xxxx. Nonetheless, at the time of OCR's visit, visual fire alarms were installed in the TC classrooms, in the restrooms, cafeteria, gymnasium, teacher's lounge, and hallways in the building.

The District’s evacuation alarm is a siren tone over the public address (PA) system, the disaster alarm for tornados uses repeating multiple tones over the PA system, and the lockdown signal is a ping sound over the PA system. The TC staff thought that, in addition to these auditory notifications, the televisions in the classrooms may possibly have words that flash across the screen to notify people of a potential disaster. The staff thought that they would use this system to notify individuals of intruders in the building as well. This system is not appropriate for students who are deaf or hard of hearing, particularly if they cannot read, because it relies on the auditory signal to alert students to look at the television screen for further information. Moreover, if they are in a room with no television screen, such as a hallway or restroom, they will have no notice at all. Additionally, the District notifies staff and students of an intruder in the building by announcing over the PA system that “Mr. Brown is in the building,” which the deaf and hard of hearing students may not hear.

OCR staff questioned District administrators as to the various alarm notifications, but no one was certain of the specifics of each notification. A poster in the hallway of Nowlin states that a fire alarm is signaled by short blasts of a horn, a disaster alarm is signaled by “repeating multiple tone” over the PA, a lockdown is signaled by a “ping” sound over the PA, and an evacuation alarm is signaled by a siren tone. The District was not able to demonstrate any of the alarm signals for OCR staff.

In this instance, the evidence is sufficient to support a finding that, because the District’s evacuation alarm, tornado alarm, and lockdown notification, and possibly the fire alarm, do not include visual alarms, the District does not provide the students and paraprofessionals in the TC classrooms, some of whom are also deaf, with notification of emergencies and emergency preparation services that is equal to the notification it provides to individuals who are not deaf or hard of hearing, nor does it provide different notifications to deaf and hard of hearing individuals that are as effective as those provided to others.²

- **Telephones, FM System**

The Complainants alleged that all of the classrooms have a Sorenson’s video relay system³ in lieu of a telephone system in the TC classrooms, but they often do not work. (The telephones in the classrooms are for teacher, not student, use.) Additionally, the

² OCR notes that because the District did not complete the installation of the visible alarms until February 2013, and therefore the alarms were installed after March 15, 2012, the 2010 ADA Standards apply. Section 702.1 of the 2010 ADA Standards provide that new fire alarm systems must have permanently installed audible and visible alarms complying with the National Fire Protection Association (NFPA) 72 (1999 or 2002 edition). The fire alarms installed in two of the three TC classrooms (room #s 5 and 22), are on the ceiling and the 2010 ADA standards provide in an Advisory to Section 215.1 that visible alarms must be located within the space they serve so that the signal is visible. Although there is also a fire alarm just outside the entrance to room #5, the door would have to be open for the alarm to be visible.

³ Sorenson’s is a video relay service that operates 24 hours a day and allows individuals to place and receive calls with a professional American Sign Language (ASL) interpreter via a videophone and a high-speed internet connection. See <http://www.sorensonvrs.com/svrs>

Complainants allege that the District did not install a Sorenson's system in the teacher's lounge, although there is a standard telephone in the teacher's lounge. They stated that as a result, the two deaf paraprofessionals who work for the District in the TC classes do not have access to an effective communication system for making personal calls.

During OCR's site visit, OCR staff observed the Sorenson's system in one classroom that was purported to not work, and noted that it was operational. OCR staff also observed that the other two classrooms had Sorensen's systems in the classroom, although one of the TC teachers said that it occasionally did not work. The staff lounge did not have a Sorensen's system at the time of OCR's visit. The paraprofessionals would have the use of one of the three Sorenson's systems in the classrooms if necessary. The Complainants asserted that the availability of the Sorensen's system is not equal to the availability of a telephone in the teacher's lounge for personal use, and that, unlike the teachers, the paraprofessionals would not have privacy when using the device in the classroom because they are typically not in the classroom alone. However, because there are three classrooms with Sorensen's systems, it is likely that there would be opportunities during each day when one of the classrooms was empty and the aide could use the Sorensen's system in the empty classroom if necessary. It is also not guaranteed that at any given time during the school day the teacher's lounge would be vacant, or afford any greater opportunity for privacy.

With respect to the allegation regarding FM systems⁴, one of the Complainants alleged that the school building did not have FM systems installed in the gymnasium at Nowlin as required. The staff members OCR interviewed, including the TC teachers, stated that the school building had the appropriate FM systems in place for all of the students in the TC classrooms wherever they were necessary and appropriate. The Complainant later acknowledged that an FM system was not installed in the gymnasium because the acoustics in the gymnasium would make an FM system inappropriate in that space unless the students had specialized hearing aids. The student with specialized hearing aids who had been in the TC program (Student A) had moved out of the District. Therefore, OCR concludes that the evidence is insufficient to support a violation finding with respect to telephones and FM systems at Nowlin.

- **Changing Tables and Signage**

The Complainants alleged that Nowlin did not have appropriate signage for students and staff in the TC program and that the changing tables were inappropriate for students with disabilities because they were massage tables. As noted above, the changing tables were large, well-padded, and did not pose any problems for the students in the TC program that OCR could identify. The students using a changing table would not climb onto the table themselves, but rather would be lifted onto the table. Although a paraprofessional stated that xxx xxxxxxxx xxx xxxxxxxxxx to lift onto the changing table because of xxx xxxxxxxx and the height of the changing table, OCR did not obtain sufficient evidence to

⁴ FM stands for "frequency modulation." An FM system is a wireless system that transmits sound directly from the sound source, e.g., a microphone worn by a teacher or placed on a table, to the receiver. An FM system can be used with hearing aids or a cochlear implant.

conclude that any students with disabilities were prevented from receiving services because of the changing tables, other than the accessibility issue described above caused by the tables' intrusion into the maneuverable space.

With respect to signage, one of the Complainants alleged that the rooms and common spaces within Nowlin were not marked using ASL signs. However, OCR staff observed during the site visit that all of the common spaces within Nowlin, such as the cafeteria, gymnasium, and the office, were marked with signs, most of which included a photograph or drawing of the ASL sign for the name of the room or space. The principal of Nowlin stated that the school administrators waited until after the first day of school to post the signage because they wanted to take photographs of the students in the TC classes making ASL signs, and also to incorporate their artwork in making the signage for the common spaces in the school.

The evidence is therefore insufficient to support a finding that the TC students are receiving less effective communication through signage at Nowlin than persons without disabilities or that the changing tables are inappropriate for use with students with disabilities. To the extent that the changing tables block access to the accessible stalls in the girls' and boys' restrooms, this is addressed in the section of this letter above discussing accessibility issues.

○ **School Activities, Extracurricular Classes, and Field Trips**

The Complainants alleged that when the District moved the TC program to Nowlin the District and Nowlin administrators excluded TC students from school activities, thus isolating them from the general Nowlin school community. For example, the Complainants alleged that Nowlin has had a longstanding tradition of saying the Pledge of Allegiance every morning outside, in the front of the school building by the flagpole. They said that in the beginning of the school year Nowlin did not include the TC students in that ceremony but rather encouraged them to say the Pledge of Allegiance in their classrooms, which, in effect, separated them from the larger school community.

The Complainants acknowledged that in either October or November xxxx the students in the TC classroom began saying the Pledge of Allegiance with the rest of the students in the front of the building. However, they stated that, because the TC program is county-wide, students are bused to the school from throughout the county and often do not arrive on time for the Pledge ceremony. The Complainants also noted that the students in the TC classrooms and other special education classrooms enter at the back of the school if they arrive by bus, have to go to their classrooms first, and then travel through the school building to get to the front, making it more likely that if their bus is late they will miss the Pledge of Allegiance. They said that the District would not change the time schedule for the Pledge ceremony to accommodate for late bus arrivals, even though the parents of the TC students had requested to at least discuss this possibility with school administrators. An e-mail exchange between xxxxx xxx the TC teachers and the principal reflects the concerns the teachers raised about students arriving late by bus for the Pledge ceremony, their request to discuss other possibilities with the principal, and the principal's response that she did not want to change the tradition.

In response to this allegation, the principal of Nowlin told OCR staff that at the beginning of the school year she thought it was better for younger students, such as the pre-k and kindergarten students, to stay in their classrooms rather than join the ceremony in the front of the building. She stated that in previous years and in the fall of xxxx all the kindergarten students, including general education kindergarten students, as well as the students in the autism classes, stayed in their rooms to say the Pledge of Allegiance. However, she said that when the teachers and parents in the TC program told her that they wanted the students in the TC classroom to participate in the Pledge ceremony, she told them that it was fine for them to participate. She further stated that when the parents raised a concern about the buses not arriving on time, she began monitoring the bus arrival times and found that the buses were regularly on time. She stated that by late October xxxx the TC students were participating in the Pledge ceremony and that since November xxxx the TC students had not missed one Pledge ceremony.

The teachers of the TC classes and the paraprofessionals responsible for bringing the students to the front of the building concurred that the buses are not typically late, although they said that it happens on occasion. Nonetheless, they stated that, as a general rule, the students in the TC classes attend the Pledge ceremony regularly. OCR notes, however, that the walk from the back of the school where the TC students are dropped off to the front of the school is substantial, and could be difficult for students with mobility impairments or for younger students, particularly in inclement weather.

The Complainants also alleged that the District excluded the TC students from other school activities and extracurricular events, such as a daily bake sale held after school. Because some students in the TC classes ride buses, at the beginning of the xxxx-xxxx school year, when the TC program had just moved to Nowlin, the bus riders in the TC program missed out on the afterschool bake sale. However, when the District became aware of the problem early in the school year staff allowed the TC students to visit the bake sale before the end of the school day. According to the Complainants, although the school makes arrangements for the TC students to participate in events if the TC students request it, the school does not inform them of events in advance. Thus, for example, although the school modified the bake sale schedule to ensure that the TC students could participate and ensured that the TC class would have the same opportunities as the other classes to host the bake sale, it did not inform the TC classes of the bake sale before the beginning of the school year.

The TC staff told OCR that the biggest obstacle for TC students to participate in afterschool events is the transportation because most of the students who ride buses at Nowlin are in center-based programs. However, when asked to give specific examples of instances where the District denied students the opportunity to participate in an event because of transportation, the TC teachers stated that the District would probably make the necessary changes to enable TC students to participate in afterschool events if they requested it, and had not denied any requests of which they were aware. They indicated that a bigger issue is the communication of special events, although the TC staff also could not identify any events of which they were not informed but the larger school community was, other than the weekly bake sale and the Pledge ceremony. They said

they receive fliers regarding school events. It appears that the District may not have at first effectively communicated information about longstanding or traditional events at Nowlin of which the school community was generally aware, such as the bake sale, but for which no fliers are issued.

OCR finds that the evidence is insufficient to support a finding that the District excluded the students in the TC program at Nowlin from participation in school-wide activities, other than at the beginning of the xxxx-xxxx school year when the TC classes were transitioning into Nowlin. However, the District should be careful to ensure that it notifies new classes to its schools about all of the activities at the school, particularly because the evidence suggests that the District moves special education programs with some frequency. Thus, the District should take measures to ensure that students in new programs have the same knowledge and opportunities to participate in school events as the students in the general education classrooms.

The Complainants also alleged that the District placed students of widely varying age and grade ranges in the same classrooms for specials such as physical education and art, regardless of their differences in physical size, skill, and ability. The TC teachers told OCR staff, however, that the only class where the TC students are combined is the music class, which they said was appropriate because the music class for the TC students differs somewhat from the music class for students who do not have hearing disabilities. The music class for TC students focuses on rhythmic games and incorporating visual components into the lessons. The teachers said that the Students participate in art and physical education with their general education peers of the same grade level. Documents the District provided indicate that at the beginning of the xxxx-xxxx school year the District had to make scheduling changes in order to ensure that sign language interpreters were available for the specials classes, and the scheduling information confirms the information the teachers provided to OCR.

Teachers also stated that, at some point during the xxxx-xxxx school year, two Wednesdays every month were “late-start” Wednesdays, and the entire school building had a different schedule on those days. Because of these scheduling changes, the two older TC classes did not have music class and instead had a combined physical education class. Neither of the two teachers of these classes felt that the combined class was inappropriate for the students in the limited instances when it occurred.

With respect to field trips, the Complainants alleged that in one instance, in the fall of xxxx, the District failed to provide accessible xxxxxxxxxxxxxxxx xxxx xxxxx xxxxxxx xxxxx xxxxxxx xxx xxxxxxxx, which resulted in the student xxxxxxxx xxx xxxx xxxxxxx xxx bus in order to attend the field trip. The District acknowledged that this occurred. The TC classes planned a field trip for xxxxxxxx xx xxxxx. The procedures for arranging field trips vary within the District from building to building and the policy at Nowlin was different from that at Whitmore-Bolles, resulting in some initial confusion about how to secure an accessible bus. However, the documents show that the TC teacher did submit an e-mail, and then followed up with a form to the director of special education on

XXXXXXXXXX xx xxxx, stating that they needed a bus with a xxxxxxxxxxxx xxxxxx. The accessible bus did not arrive and the student with the xxxxxxxxxxxx xxxxxx xxxxxxxx onto the bus. According to the evidence obtained by OCR, this was the only time the District failed to provide an accessible bus for an approved field trip.

OCR finds that the District violated the Section 504 and Title II regulations by failing to provide accessible transportation for the field trip at issue. However, OCR was not able to identify an individual remedy at this time, given that the student did attend the field trip. Nonetheless, OCR cautions the District that it should plan in advance for field trips and other activities to ensure the inclusion and equal participation as appropriate of students with disabilities, including planning for accessible transportation. In addition, as explained in the accessibility section of this letter above, the District is cautioned that xxxxxxxxxxxx persons with disabilities is an unacceptable method for achieving accessibility except in manifestly exceptional circumstances not present here.

Alleged Systemic Denial of FAPE (Allegation #11)

The Complainants alleged that the District does not assess the individual needs of each student, or of each prospective student, when determining student placement in the TC program, or when determining the classroom in which to assign a student. As background, the Complainants explained that the State of Michigan limits classroom enrollment for the TC classes and all hearing impaired classes to seven students per teacher.⁵ MDE found the District in violation of this rule in March of xxxxx. The Complainants alleged that, because of state enrollment limits and the District's reluctance to appropriately staff the TC program or hire teachers when necessary, the District instead tries to direct families with students who are hard of hearing or deaf away from the TC program and moves students within the program into and out of classrooms based solely on classroom size, rather than based on, and sometimes as opposed to, the students' individual needs.

- **Applicable Regulatory Requirements**

The Section 504 regulation, at 34 C.F.R. § 104.33, requires recipient school districts to provide a free appropriate public education (FAPE) to each qualified individual with a disability who is in the recipient's jurisdiction, regardless of the nature or the severity of the person's disability. An appropriate education for purposes of FAPE is defined as the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of nondisabled students are met, and that are developed in accordance with the procedural requirements of 34 C.F.R. §§ 104.34-104.36 pertaining to educational setting, evaluation and placement, and procedural safeguards. Implementation of an Individualized Education Program (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements.

⁵ MARSE, Rule 340.1742

Appendix A to the Section 504 implementing regulation explains that the quality of the educational services provided to students with disabilities must equal that of the services provided to students who do not have disabilities. Thus, the teachers of students with disabilities must be trained in the instruction of persons with the disability in question.

In interpreting evaluation data and in making placement decisions, a recipient must, among other requirements, ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. 34 C.F.R. § 104.35(c)(3). Parents should have a meaningful opportunity to participate and to provide input before a placement decision is made.

A recipient that operates a public elementary or secondary education program or activity must conduct an evaluation of a student with a disability prior to any significant change in the student's placement. 34 C.F.R. § 104.35(a). Generally, a significant change in placement means a significant change in the type or amount of services being provided, including the termination or substantial reduction in services, significantly altering the number of hours a child is in regular education, or certain disciplinary exclusions. On the other hand, a change in teachers or aides (or other staff) without altering the nature or amount of services, or a change in time of day when services are delivered, would not generally constitute a significant change in placement.

The Section 504 regulation, at 34 C.F.R. § 104.36, requires a recipient that operates a public elementary or secondary education program or activity to establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of disability, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of IDEA is one means of meeting this requirement. The procedural safeguards requirement of 34 C.F.R. § 104.36 requires the district to provide notice to the parent of its evaluation and placement determinations and the parent's right to challenge the district's decision by requesting a due process hearing.

- **Investigation Summary and Analysis**
 - **Reevaluation and Change of Placement of Students in the TC Program**

With respect to initial student placement in the TC program, the families of students in the program and TC teachers provided anecdotal examples of families expressing an interest in the TC program and being told that either it was inappropriate for their children because they did not have significant enough hearing loss, or because they had more than one disability, both of which, according to the Complainants, were inappropriate reasons to deny enrollment in the program. The Complainants, parents, and TC teachers said that District administrators of the TC program prohibited the teachers in

the program from communicating with parents about the program, and made administrative changes to the program that were designed to either shrink or eliminate it, which resulted in inappropriate placement decisions for students wishing to use the total communications approach to learning.

OCR learned that the process for referring students to the TC program had been in flux for several years, is determined at the intermediate school district level, and has relied, in large part, on the student's district of residence and the Wayne County RESA. In its most recent iteration, and since 2012, the director of special education for the district of residence is responsible for disseminating information about a student, such as audiology reports, to each of the hearing impaired programs in the Wayne County RESA, and then each program sends a referral coordinator to speak with the parent or guardian about the program. The parent or guardian then makes the ultimate decision about where to place their child. OCR therefore did not investigate whether the process for referral or changes in that process resulted in inappropriate placement decisions because the Wayne County RESA dictates that process. Additionally, OCR did not investigate the individual placement decisions for students who considered the TC program and then were placed in a different program. The focus of OCR's investigation of this allegation against the District was whether it took actions to inappropriately direct students away from the TC program.

[xxx---paragraph redacted---xxx]

[xxx---paragraph redacted---xxx]

[xxx---paragraph redacted---xxx]

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The District provided OCR with documents reflecting that in several instances parents selected the TC program but the students did not ultimately enroll in the program. When questioned about this, the director of special education noted that there may be numerous reasons why, after a parent completed the selection form, the student either did not enroll in the District's program or appear on the enrollment records. He said, for example, that the family may move, or the student may be identified as having more than one disability and choose a different center-based program. The referral coordinator, who visited with the families, organized the District visits, and compiled the paperwork on the students who might qualify for the TC program, made a similar statement. She said that for the xxxx-xxxx school year there were approximately xx students about whom she expected to hear from the special education directors of their residential schools and did not. She said she does not know the specific reason for this in every instance, but that in general students relocate, are misidentified, or for other reasons do not enroll. Both she and the director of special education denied turning any students away from the program. One of the TC teachers, who had previously worked for the Wayne County RESA, told OCR

staff that she believed that the Wayne County RESA, and not the District, had a bias toward oral communication programs.

Although the teacher provided three specific examples of students seeking placement in the TC program and then not enrolling in the program right away (or at all), there was no additional evidence to support that in these three instances the students did not enroll because of improper dissuasion on the part of the District. Moreover, the District provided information that, in each identified instance, there was either a legitimate, nondiscriminatory reason for why the student did not enroll (the parent chose a different program or did not meet the residency requirements), or, in one instance, the student did enroll in the program. OCR notes again, however, that it did not investigate this allegation with respect to actions attributable to the Wayne County RESA. In addition, OCR notes that information indicates that starting in the 2015-2016 school year the District is closing the TC program for students in grades pre-k through tenth grade, and continuing it only for students in the eleventh and twelfth grades.⁶

[xxx---paragraph redacted---xxx]

[xxx---paragraph redacted---xxx]

[xxx---paragraph redacted---xxx]

In response to this allegation, the director stated that, if a student has multiple disabilities and is in a TC program, moving that student from one classroom to another classroom is not a change of placement under any circumstances. He also explained that he is bound by the State of Michigan rule regarding student-to-teacher ratios, and he must follow that rule by either moving students around, hiring an additional teacher if necessary, or otherwise starting another classroom.⁷

[xxx---paragraph redacted---xxx]

The District's policy and practice of moving students in the TC program without considering their individual needs, regardless of the age range permitted under Michigan law and student-to-teacher ratio limits, can result in a violation of Section 504's FAPE procedural requirements of 34 C.F.R. §§ 104.34-104.36 pertaining to educational setting, evaluation and placement, and procedural safeguards, depending on the circumstances of each individual student. The Complainants, the TC teachers, and parents of students in the program provided specific examples of instances where students were moved into different classrooms solely on the basis of maintaining a particular ratio of students to teachers. In the instance of the student with xxxxxx xxxxxxxx, based on information that

⁶ See <http://downriversundaytimes.com/2015/03/20/dps-program-for-deaf-students-being-eliminated/>

⁷ MARSE Rule 340.1733 (Rule 33) provides that special education programs (other than those for students with severe cognitive impairments) that are operated in separate facilities shall not exceed a four-year age span at any one time. Rule 340.1742 (Rule 42), states that programs for students with hearing impairments, if operating as a special class with one teacher, shall have an enrollment of not more than 7 students.

his mother and his teachers have provided, and as supported by his IEP, OCR finds that the classroom transfer could constitute a significant change of placement, given his sensitivity to change and the overall nature of his disability, and the District should therefore have followed the procedural requirements of Section 504 regarding reevaluation and placement.

Additionally, the director of special education told OCR staff that he believes that in no instance would moving a student from one classroom to another constitute a change of placement, which suggests that he does not give notice to the parents of students of their procedural safeguards when he makes the decision to move students in this manner.

In this instance, therefore, OCR finds that the evidence is sufficient to support the conclusion that for students in the TC program, the District has in some instances failed to reevaluate students prior to changing their placement, failed to consider the appropriateness of the placement change for the student, and failed to provide procedural safeguards to the parents or guardians of these students, in violation of the Section 504 regulation at 34 C.F.R. §§ 104.33, 104.35, and 104.36.

- **Allegations Regarding Certification of Teachers and/or Aides who work for the TC Program**

The Complainants alleged that the District was hiring staff members for the TC program who were not properly certified for the demands of their positions. As explained above, the Section 504 regulation requires that teachers of students with disabilities be trained in the instruction of persons with the disability in question.

After OCR started its investigation of this complaint, the Complainants clarified that they were concerned not about District employees but rather about Wayne County RESA employees, and, particularly, whether one of the employees at Wayne County RESA was certified to teach early childhood education. Nonetheless, OCR confirmed that all three of the teachers for the TC classes had state certification for teaching students with hearing impairments and did not obtain any information that would suggest the teachers were not trained in the instruction of persons with hearing impairments.

Alleged Retaliation (Allegation #12)

The Complainants stated that they filed complaints with MDE in the spring of xxxx, including a complaint regarding the student-to-teacher ratio in the TC classrooms, and that they and the teaching staff in the TC program have advocated on behalf of the students in the TC program and asserted their rights under numerous state and federal disability laws. The first of numerous complaints regarding the TC program at Dearborn was filed with MDE on January xx xxxx, regarding the student-to-teacher ratio in the TC classes at Whitmore-Bolles. MDE found the District in violation of state law in this respect. The Complainants alleged that because of these complaint findings, and because of their advocacy, the District has taken a number of adverse actions against them, either in retaliation for the complaints they have filed, or to dissuade them from filing other

complaints. Specifically, they stated that the following actions by the District, all of which occurred during and after xxxx xxxxx, were retaliatory:

- a. failing to provide appropriate space at Nowlin, both in terms of classroom size and storage space;
- b. assigning the students in the TC classes to the only classrooms in Nowlin that do not have restrooms;
- c. inappropriately placing two TC classes into one small classroom at Nowlin;
- d. inappropriately placing students in various grade levels in the same extracurricular classes;
- e. excluding the TC students from the daily morning recitation of the Pledge of Allegiance and other school-sponsored events at Nowlin;
- f. failing to assess the individual needs of each student prior to placement in the TC program, or within a particular class in the TC program;
- g. moving the TC program from its prior location, where it had been housed for over 30 years, to its new location that was not equipped for the program; and
- h. failing to communicate vital information to parents of students in the program prior to the beginning of the 2012-2013 school year.

The Complainants also asserted that the manner in which the District communicated with the parents and teachers about moving the program from Whitmore-Bolles to Nowlin was retaliatory because it was so late in the school year, and that the District failed to communicate essential information to them prior to the beginning of the xxxx-xxxx school year in retaliation for their advocacy.

- **Applicable Regulatory Requirements**

The regulation implementing Section 504, at 34 C.F.R. § 104.61, incorporates by reference the regulation implementing Title VI of the Civil Rights Act of 1964, at 34 C.F.R. § 100.7(e), which prohibits recipients from intimidating, threatening, coercing, or discriminating against any individual for the purpose or interfering with any right or privilege secured by the regulation or because s/he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under the regulation. Title II's implementing regulation contains a similar prohibition against retaliation at 28 C.F.R. § 35.134.

To find a prima facie case of retaliation, OCR must find: (1) the individual engaged in protected activity; (2) the individual experienced a materially adverse action by the recipient; and (3) there is a causal connection between the protected activity and the materially adverse action. To determine whether a "materially adverse action" has occurred, OCR considers whether the alleged adverse action could well dissuade a reasonable person in the individual's position from making or supporting a charge of discrimination. Normally, petty slights, minor annoyances, and lack of good manners do not constitute materially adverse actions. The significance of any given act of retaliation will often depend upon the particular circumstances. Depending on context, an act that would be immaterial in some situations may be material in other situations. Whether an

action is materially adverse is judged from the perspective of a reasonable person in the individual's position.

If any of the elements of a prima facie case cannot be established, OCR will find insufficient evidence of a violation. If the evidence demonstrates a prima facie case of retaliation, a presumption or inference of unlawful retaliation is raised. OCR must then determine whether the recipient had a facially legitimate reason for the materially adverse action. If OCR finds that the recipient did have a facially legitimate reason for the materially adverse action, OCR must conduct a "pretext" inquiry to determine whether the recipient's reason is a cover-up for retaliation. Evidence of pretext may involve factual scenarios in which the individual was treated differently from how he or she was treated prior to the protected activity or was treated differently from similarly situated individuals. Evidence of pretext may also include situations in which the individual was treated in a manner that deviated from the recipient's established policies or practices.

- **Investigation Summary and Analysis**

OCR found that the Complainants engaged in protected activity when, on January xx xxxx, at least one of the Complainants filed a complaint with MDE against the District alleging that the District did not properly staff its TC program. It is undisputed that in March of xxxx MDE found the District in violation of state law limiting student-to-teacher ratios and gave the District until April xxxx to reduce the student-to-teacher ratios in each of its TC classes. The District was therefore aware of the protected activity. However, the evidence does not support that all of the actions the Complainants identified as adverse are materially adverse for purposes of a prima facie case of retaliation under Section 504 and Title II, that the District took all of the actions alleged above, or that if it did the actions, it did so because the Complainants filed the MDE complaints or otherwise advocated on behalf of the rights of the students with disabilities in the TC program.

Based on the information obtained by OCR with respect to several other related allegations discussed above, the first three alleged adverse actions listed above (items a-c), were not materially adverse actions. Although the District placed the TC students in smaller classrooms with less storage space and without attached restrooms, the TC classes have substantially fewer students than the general education classes and, based on MDE findings in a similar complaint, the actual square footage per TC program student is greater than it is for District students in the general education classrooms. The TC program classrooms are located near accessible restrooms and the evidence was insufficient to show that not having attached restrooms has been disruptive to the education of the students in the TC classes or caused these students harm. The evidence also showed that there is available storage space within each of the TC classrooms as well as in the school building. Finally, the evidence does not support that combining two small TC classes in one classroom had a negative impact on the students for the two months in which they were combined. Thus, the evidence does not support that the actions described in items (a), (b), or (c) could well dissuade a reasonable person in the Complainants' position from making or supporting a charge of discrimination.

With respect to item (d) listed above, the evidence does not support that students at various grade levels in the TC classes have been placed in the same extracurricular classes, with one exception. Additionally, although there may have been some scheduling confusion at the beginning of the xxxx-xxxx school year, there is no evidence linking this to a retaliatory motive. The director of special education said that scheduling was complicated by each individual student's needs and the TC teachers' need for planning periods. Documents the District provided show communication between the TC teachers, the principal, and the director of special education that support this explanation. When the schedules for extracurricular classes were finalized by the end of September in the xxxx-xxxx school year, the students in the TC classes attended age-appropriate extracurricular classes. To the extent that they did share extracurricular classes, the TC teachers believed that it was appropriate for the students to do so and the curriculum was designed for students with hearing impairments. Therefore, the evidence is insufficient to support a violation finding with respect to this alleged adverse action.

With respect to the allegation that the District excluded the TC students from the daily morning recitation of the Pledge of Allegiance and other school-sponsored events (item (e) above) as retaliation, the evidence shows that the District did exclude the TC students from school activities initially, in one instance inadvertently (the bake sale), and in one instance purposefully (the Pledge ceremony). However, the principal of Nowlin provided a legitimate, non-retaliatory reason for the exclusion from the Pledge ceremony at the beginning of the school year. She stated that she believed the students in the TC program would prefer to say the Pledge of Allegiance in their classrooms, as was the preference of the general education kindergarten students and students in other special education classrooms. When she became aware that they wanted to participate in the Pledge ceremony she made it clear that they were welcome to do so. There is insufficient evidence to indicate that the reason for the exclusion was a pretext. Similarly, once the District became aware of a problem with the bake sale, it allowed the TC program students to participate before the end of the school day. OCR therefore finds insufficient evidence to conclude that the District retaliated with respect to item (e).

The Complainants alleged in item (f) above that the District's alleged failure to assess the individual needs of each student prior to placement in the TC program, or within a particular class in the TC program, was retaliatory. They believe this, in part, because the basis of the MDE complaint was class size. According to the Complainants, after MDE found against the District with respect to the Complainants' complaint, District administrators dissuaded qualified students from entering the TC program and began insisting on student classroom placements based on classroom sizes rather than the individual needs of each student. However, as discussed above, the evidence is insufficient to find that the District was either discouraging or prohibiting qualified students from entering the TC program.

With respect to the placement of students within the program, the Complainants said that, after MDE found the District in violation of the MARSE rule limiting the student-to-teacher ratio in each class, the District moved the student with CHARGE syndrome and the students who were better placed in the pre-k-k class but had to attend the class for

older students because of the increased enrollment in the pre-k-k classroom. The Complainants alleged that the director of special education's mandate to move students, without discussion or consideration of their best interest, is evidence of a retaliatory motive, particularly given the mandate is directly related to their protected activity. Finally, the timeframes for making the decision, following the complaints with MDE, further support the causal connection between their protected activity and the District's moving the students.

In response to this allegation, the director of special education acknowledged that the District moved students based on the number of students in each class, stating that he was concerned about complying with the MARSE rule. He said that he did not believe that moving the students within the program would violate IDEA or Section 504, provided the students were placed in classes with classmates who are within the State of Michigan's permissible age ranges (a four-year range). The students in each of the three classes are in multiple grade levels following individualized programs of instruction, with a wide range of functioning levels.

The director of special education specifically mentioned the state student-to-teacher ratio limits in at least one e-mail to a TC teacher in which he mandated that the older students be moved out of the pre-k-k classroom, stating that the District must stay in compliance with the MARSE rule. He was responding to a parental inquiry regarding the number of students in the pre-k-k class in that e-mail exchange, which also suggests that his motive in moving the students was to stay in compliance with the MARSE rule.

Thus, although the director was mistaken in his understanding of the requirements of Section 504, he nonetheless provided OCR with the District's nonretaliatory motive for the District's actions. There is no evidence to suggest that this was a pretext for retaliation for prior complaints the Complainants have filed. Therefore, OCR finds that the evidence is insufficient to conclude that the District retaliated against the Complainants in violation of Section 504 or Title II with respect to item (f) above.

The Complainants alleged in item (g) above that the District's moving the TC program from Whitmore-Bolles, where it had been located for over 30 years, to Nowlin, a building that they asserted was not equipped for the program in terms of space and accessibility, was retaliatory. The Complainants said that the move constituted a materially adverse action because, in addition to the space and accessibility issues, to move after so many years was disruptive to the TC staff and to the students in the TC program. The Complainants noted that staff at Whitmore-Bolles knew the students in the TC program, knew sign language, and created a welcoming environment for them.

To support the assertion that the decision to move the program was because of the complaint they filed with MDE in January xxxx, the Complainants noted that the announcement of the move to Nowlin occurred just two months after MDE found the District in violation of Michigan law in March xxxx. The Complainants told OCR that, although the District represented that the decision was based on the safety issues raised by the increased number of buses arriving at Whitmore-Bolles, the District had never

raised a concern about safety prior to the decision to move the program, and never indicated that it was considering moving the program or otherwise discussed the issue with the parents or the teachers of the TC program prior to its announcement of the move. Thus, the Complainants alleged that the District's purported non-discriminatory reason for moving the program was a pretext, and that the real reason was retaliatory.

In the documents the District provided, the first reference to moving the TC program is in a May xx xxxx, letter to the parents or guardians of the students in the TC program, signed by the director of special education and the coordinator of the program, stating that it was transferring two center-based programs, including the TC program, to different schools based on several factors. It identified safety as one of the District's major concerns because of the increased number of buses picking up and dropping off students at Whitmore-Bolles, and the "overwhelming amount of traffic" there. The District does not have any e-mails, other correspondence, meeting notes, or copies of complaints to support that any discussions occurred prior to May xx xxxx, or that the District received complaints regarding safety at Whitmore-Bolles or moving the TC program to Nowlin.

The superintendent told OCR that typically with decisions such as program moves directors make recommendations to him and then he makes a decision to adopt the recommendation or not. The board of education does not approve these types of decisions, he is the final approver, and the discussion and decision process is not typically reflected in writing. He said that, therefore, it was not unusual that there was no documentation showing that the District had been considering moving the TC program, or that he and the director of special education had discussed it prior to making the final decision.

According to the superintendent, in this instance the director raised the possibility of moving the program some time prior to the end of the xxxx-xxxx school year. He said that he and the director of special education discussed the fact that Whitmore-Bolles has one pick-up and drop-off point in the front of the building, whereas Nowlin has two, due to its location on a corner—one in front and one on the side. He stated that traffic congestion had become an issue at Whitmore-Bolles. He said that the only negative impact of the move was that it would frustrate the parents.

The director of special education said that the safety issue at Whitmore-Bolles had been a topic of discussion between him and the program coordinator for at least two years, and that he had discussed it with his supervisors as well, although he did not mention to OCR that he discussed the move with the superintendent. The director said that during the xxxx-xxxx school year the needs of Whitmore-Bolles changed; the preschool program grew to xx students, each student being individually picked up and dropped off. He felt that the traffic at Whitmore-Bolles was becoming too disorderly, and it was made worse by the fact that the building is "landlocked," a concern reiterated by the assistant supervisor of transportation. The director stated that when he made the decision to move the program he talked to the supervisor of transportation about it. Although the supervisor of transportation said he did not speak with anyone about the move, the assistant supervisor did recall a meeting with the supervisor of transportation and the director of special education.

The assistant supervisor of transportation said that he had visited Whitmore-Bolles at least a dozen times to observe the traffic and he thought the number of buses coming and going was a problem. He stated that they discussed cutting back the number of buses, but that was not feasible. OCR staff visited Whitmore-Bolles on a school morning and confirmed that there is only one street entrance to the school at the front of the building. OCR also observed, however, that it has a parking lot immediately adjacent to the building, and a system set up so that parents can drop their children off at a sidewalk leading straight into the school from that parking lot that keeps them out of the line of traffic. The school also has a parking attendant to help direct traffic. Nonetheless, on the morning of OCR's visit, many parents seemed to avoid the parking lot and drop their children off across the street from the school, in a location that would require the children to cross the street with heavy bus traffic. Nowlin, on the other hand, has a street in front of the building for pick-up and drop-off and a narrow side street where the buses line up. Although there is some foot traffic on the side street, there is not as much as appeared to be in the front of Whitmore-Bolles on the morning of OCR's visit.

Although the timing of the decision to move the program is suspect, the evidence is nonetheless insufficient to support a finding that the District retaliated against the Complainants in moving the TC program. The District provided a facially nondiscriminatory reason for the move (safety concerns), and there is insufficient evidence to show that this reason was a pretext. There are two street entrances to Nowlin and a large number of buses transporting the students in center-based programs. Moreover, the District provided evidence that it moved other center-based programs at the same time that it moved the TC program.

[xxx---paragraph redacted---xxx]

In response to these allegations, the director of special education and the principal of the building both noted that they had had several meetings with the parents of the students in the TC program over the summer prior to the xxxx-xxxx school year at Nowlin and provided documents showing meeting agendas and summaries to support that the meetings occurred. The Complainants do not dispute this. The principal said that the parents knew where the classrooms were at the TC program because they had visited and toured Nowlin in June. The principal also stated that she does not give the general education students information about classroom and teacher assignments much sooner than the notice given to the TC student families in this instance; she makes the information available on the Friday before school starts so that she has time and flexibility to make last-minute changes as necessary. She told OCR staff that she posts general education classroom assignments on the front window of the school but she does not publicly post special education assignments in the front window because of confidentiality, and also because she does not assign the hearing impaired students to their classrooms—the special education department does this. She said that no one complained to her or raised an issue about the communication with the parents or told her they had not received a bus schedule. The principal noted that at least two of the TC teachers had a blog, and the director of special education said he also set up a blog for the parents of the TC program a little bit later in the school year.

The District’s transportation office handles the busing communication, and there is no indication that employees in this office had any knowledge of the Complainants’ protected activity. Moreover, there is no correspondence between TC staff or parents and the District suggesting that students in the TC program failed to receive information regarding bus schedules on the first day of the xxxx-xxxx school year. OCR staff spoke with three employees in the District’s transportation department, and they stated that at the beginning of the school year it is typical for the transportation department to get complaints regarding bus scheduling and pickup locations, particularly with regards to special education students and particularly if a student was transferred from one program to another.

With respect to this allegation, the evidence is insufficient to support a finding that the District failed to communicate vital information to parents of students in the program prior to the beginning of the xxxx-xxxx school year, or to the extent that it did, that the failure was a materially adverse action. The evidence shows that the District had several meetings with the parents of the students in the TC program prior to the start of the school year, and to the extent that it may have failed to communicate specific information about classrooms or teacher assignments, the parents knew where the three TC classrooms were in the building and had the opportunity to meet all three teachers in the TC program in the summer before the start of the school year. If they did not have their classroom assignments, there were only two classrooms at the beginning of the school year where the TC students could have been located. With respect to busing assignments, the evidence suggests that there could have been missed communication regarding bus schedules or pickup locations, as this is typical at the beginning of each school year, based on the fact that the transportation department gets a lot of complaints. Thus, this failed communication is not unique to the students in the TC classroom.

The Complainants also said that the District has taken other actions designed to limit communication to the deaf and hard of hearing community in Wayne County about the TC program, in retaliation for the complaints they had been filing since January xxxx. Specifically, they alleged that the District placed additional communication limitations on the TC teachers after the Complainants filed the MDE complaint. The Complainants provided OCR with a copy of a letter dated July xx xxxx, that the District’s human resources officer sent to xxxx xxx TC teachers describing a meeting with xxxxx teacher, the director of special education, the coordinator of the TC program, a union representative, and the human resources officer that had occurred on June xx xxxx, approximately three months after the MDE decision against the District. At the meeting, as recounted in the letter, they discussed “communication protocol.”

[xxx---paragraph redacted---xxx]

[xxx---paragraph redacted---xxx]

According to the Complainants, the District’s communication protocol is materially adverse because it restricts the flow of information to the parents of students in the TC program. The Complainants also believe that the communication restriction, coupled with other actions that the District and the Wayne County RESA have taken, are designed

to restrict enrollment in the TC program, in part by keeping information from the community.

The director of special education responded that the District was trying to streamline communications, particularly with the parents of students who were considering the program, because sometimes the teachers get directly involved with parents before the local school district knows there is a student with a hearing impairment. He said that he told the teacher that she had to follow the protocol because they cannot offer the TC program to a student unless the local school district first makes the placement determination, and he does not want a parent thinking differently. His concern was that the TC teachers would give misleading information to parents. Therefore, he said he wanted communications about the TC program to go through the coordinator until the student was enrolled in the program with a teacher of record.

Here, the evidence is sufficient to establish that the District’s attempt to limit the TC teacher’s communication with parents or “other individuals or organizations outside of the school district” about a number of issues, including “legal issues,” on its face, prohibits her from filing complaints with outside agencies. It also prohibits her from sharing information with others who could then file complaints with outside agencies. Thus, the communication protocol would have a chilling effect on potential protected activity under Section 504 and Title II by the TC teacher if she complied with it. There is also evidence to show a causal connection between the protected activity and the District’s letter to xxxx xxxxx xxxxxxxx limiting xxx communication, as the meeting occurred in June xxxx, shortly after the resolution of the first MDE complaint. Moreover, the District was concerned that the TC teacher was giving “misleading information” to parents, who were filing complaints with MDE.

The District did not provide a legitimate, nondiscriminatory basis for limiting xxxxxx xxxxxxxx communication to this degree. Although the director of special education said the reason for the limitation was to streamline communications and prevent mixed messages with parents of potential students, the breadth of the limitation suggests that this stated reason is a pretext, as it goes far beyond communications with parents about placement in the TC program and would preclude xxxx xxxxx xxxxxxx from communicating with agencies such as MDE or OCR, or with parents of students already in the program, about any concerns regarding program implementation.

In summary, OCR finds that the evidence is insufficient to show that the District retaliated against the Complainants with respect to all of the alleged adverse actions with the exception of item (h) above. With respect to item (h), the evidence is sufficient to support a finding that the District retaliated against the Complainants and xxxx xxx xxxxxxx by issuing a communication protocol prohibiting xxxx xxxxx xxxxxxx from communicating with anyone except xxxx xxxxx xxxxxxx about the TC program, including communication regarding legal issues, such as the protected activity of filing a complaint with a state or federal agency.

extent that MDE did not address all of the allegations that the Complainant raised, the evidence is insufficient to support a finding that the District denied Student A a FAPE through its xxxxxxxxxxxx xx xxxxxxxxxxxxxxxx xxxxxxxxxxx xxxxxxxxxxxxxxxxxxxx x xxxxxxxx.

Although the Complainant raised concerns with the District about specific incidents that had occurred with Student A in the spring of xxxx, none of the incidents could be established to be the product of the District's failure to implement Student A's IEP or District neglect.

[xxx---paragraph redacted---xxx]

Thus, there is insufficient evidence to show that the District was responsible for the occurrences through its failure to implement Student A's IEP.

OCR concludes, therefore, that most of the allegations concerning Student A have been adequately addressed by MDE and to the extent that MDE did not address one portion of the allegation, the evidence is insufficient to support a violation finding that the District denied Student A a FAPE.

Resolution and Conclusion

In summary, OCR finds insufficient evidence to support violation findings with respect to allegations ##1, 2, 3, 4, 5, 6, 7, 10, part of 12, and 13. However, the evidence is sufficient to support violation findings regarding allegations ##8 (accessibility), 9 (adequate equipment and alarms), 11 (placement based on the individual needs of students), and part of 12 (retaliation with respect to the implementation of a communication protocol against one of the xxxxxxxxxxxx xxxxxxxxxxxx).

In order to resolve the complaint, the District signed the enclosed resolution agreement on April 21, 2015, which, once implemented, will fully address the violation findings in accordance with the requirements of Section 504 and Title II. The agreement requires the District to: 1) make modifications to Nowlin by no later than September 11, 2015, in accordance with the 2010 ADA Standards; 2) by June 26, 2015, revise the emergency procedures for Nowlin; 3) ensure that the TC classrooms at Nowlin have the same or equivalent technology as the general education classrooms with respect to interactive whiteboard systems; 4) determine whether each student enrolled in the TC program at Nowlin from the beginning of the xxxx-xxxx school year to the present needs compensatory and/or remedial services and, if so, provide those services by no later than June 24, 2016; and 5) revise the District's communication protocol for all of the teachers and staff at Nowlin and issue a statement to the xxxxxxxxxxxxxxxxxxx xxxxxxxx and parents of students in the TC program at Nowlin explaining the District's prohibition against retaliation for engaging in protected activity. Please provide the revised communication protocol and a copy of the District's statement with the District's June 26, 2015, monitoring report.

This concludes OCR's investigation of the complaint and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter.

This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

Please be advised that the District may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the harmed individual may file another complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

A complainant may file a private suit in federal court, whether or not OCR finds a violation.

OCR appreciates the cooperation of the District during the investigation and resolution of this complaint. For questions about implementation of the Agreement, please contact xxxxxxxxxxxxxxxx, who will be monitoring the District's implementation of the Agreement, at (216) xxx-xxxx or by e-mail at xxx.xxxxxxxxxx@ed.gov. We look forward to receiving the District's first monitoring report by June 26, 2015. If you have any questions about this letter, please contact xxxxxxxxxxxxxxxx, Supervisory Attorney/Team Leader at (216) xxx-xxxxx, or by e-mail at xxxxxxxxxxxxxxxxn@ed.gov.

Sincerely,

/s/

Meena Morey Chandra
Director

Enclosure